EDDIE LEE KIM TAK & ORS

v.

JURUTERA KONSULTANT (SEA) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-2375-1999]
19 APRIL 2002

CIVIL PROCEDURE: *Pleading - Striking out - Striking out writ of summons and statement of claim - Whether triable issues raised - Whether application to be dismissed - Rules of High Court 1980, O. 18 r. 19*

This was an application by the defendants to strike out the plaintiffs' writ of summons and statement of claim under O. 18 r. 19 Rules of the High Court 1980. The plaintiffs had applied for declarations inter alia to declare null and void certain decisions made by the learned deputy registrar and judge of the Kuala Lumpur High Court pertaining to the status of the defendants' counterclaim, on the grounds that the same were inconsistent with earlier findings made by the Shah Alam High Court on that issue. In so applying to strike out the plaintiffs' action, the defendants argued that acceding to the claim would mean that there would be no end to litigation. The issue was whether the plaintiffs' action was so clearly frivolous or vexatious as to warrant a striking out.

Held:

[1] The plaintiffs' action is not to challenge or question the jurisdiction of the Kuala Lumpur High Court in regard to the decision made by the deputy registrar on 1 April 1999 and that made by the judge on 10 June 1999 in regard to the plaintiff's application to strike out the defendants' counterclaim or to circumvent or re-litigate the same. Rather, the crux of the plaintiffs' contention was that the decision of the learned judge of the Kuala Lumpur High Court made on 10 June 1999 that the finding of the learned judge of the Shah Alam High Court on the issue of the defendants' counterclaim made on 2 September 1998 was '*obiter dicta*' was plainly contrary to and inconsistent with his own earlier decision made on 4 January 1999 in regard to an interlocutory application in the very same case wherein he had acknowledged the decision of the learned judge of the Shah Alam High Court on 2 September 1998 that "a court of competent jurisdiction has found that there is no basis to sustain a counterclaim". (p 251 d)

[1a] Hence, the plaintiffs' action before this court is to ensure finality in the decision and finding on the issue of the defendants' counterclaim as made by the Shah Alam High Court on 2 September 1998. The plaintiff is not asking this court to question the decision of the learned judge of the Kuala Lumpur High Court made on 10 June 1999 but to determine which of the decisions on the issue of the defendant's counterclaim must prevail, *ie*, that of the Shah Alam High Court made by the learned judge on 2 September 1998 or those of the Kuala Lumpur High Court made by the learned deputy registrar on 1 April 1999 and the learned judge on 10 June 1999. Clearly, there exist triable issues to be determined by the court. (p 251 g-h)

[Defendants' application dismissed.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1979] 2 MLJ 101 ***(refd)***

Dr Mahesan & Ors v. Ponnusamy & Ors [1994] 3 MLJ 312 HC ***(refd)***

Guaranty Trust Co of New York v. Hannay & Co [1915] 2 KB 536 ***(refd)***

Ladang Tai Tak (KT) Sdn Bhd v. Suppliah Andy Thavar & Ors [1999] 6 CLJ 348 HC ***(refd)***

Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener) [1995] 2 CLJ 846 HC ***(refd)***

Tuan Hj Ishak Ismail & Ors v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

United Malayan Banking Corporation Bhd v. Sykt Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 HC ***(refd)***

Yap Liang Neo v. Tan Yew Chee & Anor [1936] MLJ Rep 113 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the plaintiffs - Yusof Khan (Lee Chan Leong); M/s Chan Leong & Co
For the defendants - CM Owee; M/s Joseph Yeo

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

This is an application (*vide* encl. 5) by the defendants to strike out the writ of summons and statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and the inherent jurisdiction of the court.

The plaintiffs' action is for a declaration that:

(a) This Honourable Court doth declare that the decisions of the learned deputy registrar dated 1 April 1999 and the learned judge dated 10 June 1999 are null and void in so far as the same are inconsistent with and contrary to the findings of the Shah Alam High Court dated 2 September 1998 that the defendants' counterclaim is without any basis or merits, being contrary to the terms of the settlement agreement and is not *bona fide*; and

(b) The decision of the learned judge in the Kuala Lumpur High Court Civil Suit No. S2-22-682-98 (formerly known as Shah Alam High Court Civil Suit No. MT1-22-785-98) that whatever was said by the Shah Alam High Court Judge in the grounds of judgment dated 2 September 1998 in respect of the counterclaim is *obiter dicta* because the issue of counterclaim was not *res integra* is null and void and of no effect, being contrary to or inconsistent with the said findings of the Shah Alam High Court in the same suit.

The suit *via* Mahkamah Tinggi Shah Alam Guaman No. MT1-22-785-98, which was subsequently transferred to Mahkamah Tinggi Kuala Lumpur with a new prescribed serial number as Guaman No. S2-22-682-98 ('the suit'), was commenced by the plaintiffs against the defendants premised upon a settlement agreement reached on 6 May 1998 between the 1st and 3rd plaintiffs on the one part and the defendants on the other part ('the settlement agreement'). In the plaintiffs' O. 14 application, the plaintiffs *inter alia* prayed for a declaration in prayer 1(d) that:

> … the plaintiffs are not liable to the defendants for any sum of money under the Settlement Agreement by reason of failure of the defendants to support their claim with proper documents.

During the hearing of the O. 14 application on 2 September 1998, the learned judge of the Shah Alam High Court, after hearing extensive submissions from both sides, granted the plaintiffs liberty to enter final judgment against the defendants as per terms of the plaintiffs' application except for prayer 1(d). Nevertheless, the Shah Alam High Court, in the grounds of judgment dated 2 September 1998, held *inter alia*, after dealing extensively on the issue of the

defendants' counterclaim, that the defendants' counterclaim is without any basis or merits, being contrary to the terms of the settlement agreement and is not *bona fide*. Subsequent to the transfer, the Kuala Lumpur High Court had, *vide* judgment dated 21 August 1998 when dismissing the plaintiffs' application for an injunction, *inter alia*, acknowledge:

> A court of competent jurisdiction has found that there is no basis to sustain a counterclaim.

The plaintiffs subsequently took out an application to strike out the defendants' counterclaim. In dismissing the plaintiffs' application to strike out the defendants' counterclaim, the deputy registrar in her grounds of decision dated 1 April 1999, *inter alia*, held:

> The Honourable Court's earlier decision (i.e. the finding arrived at on the defendants' counterclaim during Summary Judgment Application) was not in respect of the defendants' counterclaim.

The plaintiffs' contention is that this finding is *ex facie* inconsistent with the findings of the Shah Alam High Court in the O. 14 proceedings aforesaid. On appeal against the deputy registrar's decision to the judge in chambers, the learned judge of the Kuala Lumpur High Court in his grounds of judgment dated 10 June 1999, *inter alia*, held:

> … the learned Judge in making no order in respect of prayer (d) or by not stating in the order that he had considered the counterclaim and thus was dismissing it, was in my view making *obiter dicta* statements when in his written judgment he considered the counterclaim …
>
> (Note: Prayer (d) refers to the declaration sought by the plaintiffs during the Order 14 proceedings under prayer 1(d) that they are not liable to the defendants for any sum of money under the Settlement Agreement by reason of failure of the defendants to support their claims with proper documents.)
>
> … since the learned Judge had made no order regarding prayer (d) or the counterclaim, on 2.9.98, it is my judgment that whatever was said by the learned Judge in his written judgment in respect of the counterclaims is *obiter dicta* because the issue of the counterclaim was not *res integra*.
>
> Again I must rest my judgment on the basis that on 2.9.98 when the learned Judge made his decision there was no question of issue estoppel in respect of the counterclaim because he made no reference to the same either in prayer (d) or to the counterclaim proper.

Quite forcefully in my view, the plaintiffs had argued that *ex facie* the decision of the learned judge of the Kuala Lumpur High Court on 10 June 1999 is not only inconsistent with the findings on the issue of the defendants' counterclaim

arrived at by the Shah Alam High Court, but is also inconsistent with his own earlier acknowledgement in his decision on 21 August 1998 that "a court of competent jurisdiction has found that there was no basis to sustain a counterclaim". When dismissing the plaintiffs' application to amend the order and judgment pursuant thereto both dated 2 September 1998 on the ground that the omission of the findings of the Shah Alam High Court from the order and judgment pursuant thereto was accidental, the learned judge of the Kuala Lumpur High Court held on 27 August 1999 that the findings of the Shah Alam High Court on the issue raised in reference to the defendants' counterclaim was *obiter dicta*.

In dismissing the defendants' application I am guided by the following well-settled principles:

(a) It is well settled law that an action for the court to exercise its wide declaratory powers need not be grounded upon a cause of action (see *Dr Mahesan & Ors v. Ponnusamy & Ors* [1994] 3 MLJ 312; *Guaranty Trust Co of New York v. Hannay & Co* [1915] 2 KB 536; *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1979] 2 MLJ 101; *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 CLJ 846; *Ladang Tai Tak (KT) Sdn Bhd v. Suppliah a/l Andy Thavar & Ors* [1999] 6 CLJ 348; *Tuan Haji Ishak bin Ismail & Ors v. Leong Hup Holdings Bhd and Other Appeals* [1996] 1 CLJ 393; see also Jamir & Woolf – *The Declaratory Judgment* (2nd edn) Sweet & Maxwell 1993).

(b) If a decision of the High Court sought to be impugned is null and void or made without jurisdiction the plea of *res judicata* and estoppel is precluded and displaced entirely (see *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 *(supra)*).

(c) A null and void order may be set aside by a court of co-ordinate jurisdiction as: "When an order is a nullity an appeal is somewhat useless, as despite any decision on appeal, such an order can be attacked in collateral proceedings, …" (per Edgar Joseph Jr. J in *United Malayan Banking Corporation Berhad v. Syarikat Perumahan Luas Sdn Bhd (No. 2)* [1988] 3 MLJ 352).

(d) It is unnecessary to appeal against a null and void decision if found to be so (see *Eu Finance Berhad v. Lim Yoke Foo (supra); United Malayan Banking Corporation Berhad v. Syarikat Perumahan Luas Sdn Bhd (No. 2) (supra)*).

(e) For the purposes of an O. 18 r. 19 application the respondent (be it a plaintiff or defendant) needs only to make out a mere *prima facie* case; in the instant case, being that a null and void decision was made. And, the court ought not to strike out an action in limine unless the claim is clearly frivolous or vexatious, as so succinctly put in the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 by Mohamed Dzaiddin SCJ (as he then was).

Clearly, in my view the issue that arises for determination in this action for declaration is: whether the learned judge in the Shah Alam High Court had made a finding of fact in regard to the issue of the defendants' counterclaim? And if so, could the deputy registrar and the learned judge of the Kuala Lumpur High Court ignore the finding of fact on the issue of the defendants' counterclaim by the learned judge of the Shah Alam High Court that "the defendants' counterclaim is without any basis or merit being contrary to the terms of the settlement agreement and is not *bona fide*"?

In my judgment the plaintiffs' action is not to challenge or question the jurisdiction of the Kuala Lumpur High Court in regard to the decision made by the learned deputy registrar on 1 April 1999 and that made by the learned judge on 10 June 1999 in regard to the plaintiffs' application to strike out the defendants' counterclaim or to circumvent and relitigate on the same. Rather, the crux of the plaintiffs' contention is that the decision of the learned judge of the Kuala Lumpur High Court made on 10 June 1999 that the finding of the learned judge of the Shah Alam High Court on the issue of the defendants' counterclaim made on 2 September 1998 'was *obiter dicta*' was plainly contrary to and inconsistent with his own earlier decision made on 4 January 1999 in regard to an interlocutory application in the very same case wherein he had acknowledged the decision of the learned judge of the Shah Alam High Court on 2 September 1998 in the following terms:

> A court of competent jurisdiction has found that there is no basis to sustain a counterclaim.

Hence, the plaintiffs' action before this Court is in fact to ensure finality in the decision and finding on the issue of the defendants' counterclaim as made by the Shah Alam High Court on 2 September 1998, and not as suggested by the defendants when they submitted that "acceding to the plaintiffs' claim would mean that there will be no end to litigation as each and every decision will be liable to be set aside".

In this proceeding, the plaintiffs are not asking this court to question the decision of the learned judge of the Kuala Lumpur High Court made on 10 June 1999 but rather to determine (which was what Adrian Clark J did in *Yap*

Liang Neo v. Tan Yew Chee & Anor [1936] MLJ Rep. 113 some seven decades ago) which of the decisions on the issue of the defendants' counterclaim must prevail, that is, that of the Shah Alam High Court made on 2 September 1998 or those of the Kuala Lumpur High Court made by the learned deputy registrar on 1 April 1999 and the learned judge on 10 June 1999.

In the circumstances, I am entirely satisfied that there are eminently triable issues for determination and I dismissed the defendants' application with costs.